

## SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT AND RELEASE (hereinafter "Agreement") is entered into by and between the STATE OF CALIFORNIA AIR RESOURCES BOARD (hereinafter "ARB"), with its principal office at 1001 I Street, Sacramento, California 95814 and CON-WAY FREIGHT, with its principal office at 3516 Kiessig Avenue, Sacramento, CA 95823

### RECITALS

- (1) *California Health and Safety Code (H&SC)* Section 44011.6 established the Heavy Duty Vehicle Inspection Program (HDVIP). It authorizes ARB to inspect on-road heavy-duty vehicles for excessive smoke emissions and engine tampering and to issue citations, accordingly. The program also requires the vehicle owner to repair its engines that exceed the prescribed ARB smoke opacity standards, perform a post-repair opacity test, and submit proof of repairs and any assessed penalties under the Regulations of the Heavy-Duty Smoke Inspection Program, Chapter 3.5, Sections 2180-2188, Title 13, California Code of Regulations (CCR).
- (2) *H&SC* Section 43701 provides that ARB shall adopt regulations that require owners or operators of heavy-duty diesel motor vehicles to perform regular inspections of their vehicles for excess smoke emissions.
- (3) Title 13, CCR sections 2190 et seq. were adopted under the authority of *H&SC* section 43701 and, with limited exceptions which are not applicable here, apply to all heavy-duty diesel-powered vehicles with gross vehicle weight ratings greater than 6,000 pounds which operate on the streets or highways within the State of California.
- (4) Title 13, CCR sections 2190 et seq. authorize the Periodic Smoke Inspection Program (PSIP) which requires the owners and operators of California based truck fleets of two or more heavy duty diesel motor vehicles with gross vehicle weight ratings greater than 6,000 pounds which operate on the streets or highways within the State of California to conduct annual smoke opacity inspections of their vehicles that are four years older than the model year of the vehicle's engine.
- (5) Title 13, CCR section 2192(a) requires inter alia that the owner of the vehicle "[t]est the vehicle for excessive smoke emissions periodically according to the inspection intervals specified in section 2193(a), (b), and (c)", "[m]easure the smoke emissions for each test...", "[r]ecord the smoke test opacity levels and other required test information as specified in section 2194..." and "[k]eep the records specified in section 2194 for two years after the date of inspection."

- (6) *H&SC* Section 43016 states, "Any person who violates any provision of this part, or any order, rule, or regulation of the state board adopted pursuant to this part, and for which violation there is not provided in this part any other specific civil penalty or fine, shall be subject to a civil penalty of not to exceed five hundred dollars (\$500) per vehicle."
- (7) The ARB considers testing, measuring, recording, and recordkeeping to be critical components in reducing excessive smoke emissions from these heavy-duty vehicles.
- (8) CON-WAY FREIGHT, failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy-duty diesel vehicles identified on Attachment A, hereinafter referred to as the "Units" for 2008 and 2009 in violation of Title 13, CCR Sections 2190 et seq.
- (9) The ARB alleges that if the facts described in recital paragraphs (1) – (8) were proven, civil penalties could be imposed against CON-WAY FREIGHT, as provided in *H&SC* section 43016.
- (10) CON-WAY FREIGHT is willing to enter into this Agreement solely for the purpose of settlement and resolution of this matter with ARB. ARB accepts this Agreement in termination of this matter. Accordingly, the parties agree to resolve this matter completely by means of this Agreement, without the need for formal litigation.

### TERMS & RELEASE

In consideration of ARB not filing a legal action against CON-WAY FREIGHT, for the violations alleged above, ARB and CON-WAY FREIGHT, agree as follows:

- (1) Upon execution of this agreement, CON-WAY FREIGHT shall pay a civil penalty of twenty-one thousand dollars (\$21,500). Payment shall be made in check form as described below and the full amount shall be submitted as follows.
  - \$16,125.00 made payable to the **California Air Pollution Control Fund.**
  - \$ 5,375.00 made payable to the **Peralta Community College District.**

All payments and documents shall be sent to the attention of:

David C. Gray  
California Air Resources Board, Enforcement Division  
P.O. Box 2815  
Sacramento, CA 95812

- (2) CON-WAY FREIGHT shall not violate *H&SC* Sections 43701 et seq. and 44011.6 et seq. and Title 13, CCR Sections 2180 et seq., 2190 et seq., and 2485 et seq.

with respect to its vehicles subject to the HDVIP under Title 13, CCR section 2180 and/or the PSIP under Title 13, CCR section 2190.

- (3) CON-WAY FREIGHT shall comply with one or both of the following options, to attend the California Council on Diesel Education and Technology (CCDET) class, as described on the ARB's webpage at [www.arb.ca.gov/msprog/hdvp/hdvp.htm](http://www.arb.ca.gov/msprog/hdvp/hdvp.htm). This class is conducted by various California Community Colleges and instructs attendees on compliance with the PSIP and the HDVIP.
  - (a) CON-WAY FREIGHT shall have at least one staff member responsible for compliance with the PSIP and the HDVIP attend the CCDET class. Proof of CCDET completion shall be provided to ARB within one year of the Effective Date (as defined below) of this Agreement and shall be maintained in each applicable employee's file for the term of his or her employment, or as provided by CON-WAY FREIGHT, rules, regulations, codes or ordinances, whichever is longer.
  - (b) If CON-WAY FREIGHT uses a contractor to perform the annual smoke opacity testing required under the PSIP, CON-WAY FREIGHT, shall obtain proof that the contractor's staff conducting the smoke opacity test completed the CCDET course within the past four years. This proof of CCDET completion shall be provided to ARB with PSIP records as required by this Settlement Agreement and shall be maintained with the annual PSIP records.
- (4) CON-WAY FREIGHT shall submit copies of all PSIP compliance records with respect to its vehicles which are subject to the PSIP under Title 13, CCR section 2190 for years 2011 and 2012 to the ARB within 60 days of the end of each such year and for year 2010 within ninety (90) days from date when the last of the parties hereto execute this Agreement (the "Effective Date"). Copies shall be addressed to the attention of David C. Gray at the California Air Resources Board, Enforcement Division, P.O. Box 2815, Sacramento, CA 95812. The ARB reserves the right to visit any CON-WAY FREIGHT, fleet location at any time to conduct compliance audits for the HDVIP and PSIP, or any other applicable ARB program.
- (5) CON-WAY FREIGHT, shall complete Low NOx Software Upgrades (reflash) per current OEM specifications on all of its vehicles which are subject to the HDVIP under Title 13, CCR section 2180 and/or the PSIP under Title 13, CCR section 2190 for the years 2010, 2011 and 2012 no later than one hundred and eighty (180) days after an engine requiring reflash to comply with ARB emission standards is identified or included in its fleet.
- (6) Each vehicle referred to in Attachment A as defined in Section 8 to the Recitals herein, as a CON-WAY FREIGHT Unit, which is subject to the HDVIP under Title 13, CCR section 2180 and/or the PSIP under Title 13, CCR section 2190, shall have proof that its engine meets emissions standards at least as stringent as U. S. federal standards for its model-year by having a manufacturer's emission control

label (ECL) properly affixed to the engine within 45 days of the Effective Date of this Agreement.

- (7) Within 45 days of the Effective Date of this Agreement, CON-WAY FREIGHT shall instruct all employees who operate diesel fueled commercial vehicles in California as defined in CCR, Title 13, Section 2485(b) to comply with the idling regulations set forth in CCR, Title 13, Section 2485.
- (8) This Agreement shall apply to and be binding upon CON-WAY FREIGHT, and upon ARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Agreement.
- (9) Now, therefore, in consideration of the payment by CON-WAY FREIGHT, in the amount of twenty one thousand five hundred dollars (\$21,500.00), ARB hereby releases CON-WAY FREIGHT, and its principals, officers, directors, agents, subsidiaries, predecessors, and successors from any and all claims that ARB may have based on the facts and allegations described in recital paragraphs (1) through (8) above. The undersigned represent that they have the authority to enter into this Agreement.
- (10) This Agreement constitutes the entire agreement and understanding between ARB and CON-WAY FREIGHT, concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and CON-WAY FREIGHT, concerning the subject matter hereof.
- (11) No agreement to modify, amend, extend, supersede, terminate, or discharge this Agreement, or any portion thereof, is valid or enforceable unless it is in writing and signed by all parties to this Agreement.
- (12) Severability. Each provision of this Agreement is severable, and in the event that any provision of this Agreement is held to be invalid or unenforceable, the remainder of this Agreement remains in full force and effect.
- (13) This Agreement shall be interpreted and enforced in accordance with the laws of the State of California, without regard to California's choice-of-law rules.
- (14) SB 1402 Statement

Senate Bill 1402 (Dutton, Chapter 413, statutes of 2010) requires the ARB to provide information on the basis for the penalties it seeks (*see Health and Safety Code section 39619.7*). This information, which is provided throughout this settlement agreement, is summarized here.

**The manner in which the penalty amount was determined, including a per unit or per vehicle penalty.**

Penalties must be set at levels sufficient to discourage violations. The penalties in this matter were determined in consideration of all relevant circumstances, including the eight factors specified in Health and Safety Code section 43024.

#### PSIP Violations

The per vehicle penalty for the PSIP violations involved in this case is a maximum of \$500 per vehicle per violation per year. The penalty obtained for the PSIP violations involved in this case is \$21,500 for 45 violations over two years resulting in a per vehicle per year penalty of \$500.

**The provision of law the penalty is being assessed under and why that provision is most appropriate for that violation.**

#### PSIP Violations

The penalty provision being applied to the PSIP violations is Health and Safety Code section 43016 because CON-WAY FREIGHT failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy duty diesel vehicles for years 2008, and 2009 in violation of the PSIP regulation in Title 13, CCR Sections 2190 et seq., for 45 vehicles. Since the PSIP regulation was adopted pursuant to authority granted in Part 5 of Division 26 of the Health and Safety Code and since there is no specific penalty or fine provided for PSIP violations in Part 5, Health and Safety Code section 43016 is the applicable penalty provision.

**Is the penalty being assessed under a provision of law that prohibits the emission of pollution at a specified level, and, if so a quantification of excess emissions, if it is practicable to do so.**

#### PSIP Violations

The provisions cited above do prohibit emissions above a specified opacity or level of g/hp-hr. However, since the hours of operation of the non-compliant trucks involved and their individual emission rates are not known, it is not practicable to quantify the excess emissions.

- (15) CON-WAY FREIGHT acknowledges that ARB has complied with SB 1402 in prosecuting or settling this case. Specifically, ARB has considered all relevant facts, including those listed at HSC section 43024, has explained the manner in which the penalty amount was calculated (including a per unit or per vehicle penalty, if appropriate), has identified the provision of law under which the penalty is being assessed and has considered and determined that this penalty is being assessed under a provision of law that prohibits the emission of pollutants at a specified level. However, since the hours of operation of the non-compliant units

involved and their individual emission rates are not known, it is not practical for ARB to quantify the excess emissions.

- (16) Penalties were determined based on the unique circumstances of this matter, considered together with the need to remove any economic benefit from noncompliance, the goal of deterring future violations and obtaining swift compliance, the consideration of past penalties in similar cases negotiation, and the potential costs and risk associated with litigating these particular violations. The penalty reflects violations extending over a number of days considered together with the complete circumstances of this case.
- (17) The penalty in this case was based in part on confidential business information provided by CON-WAY FREIGHT that is not retained by ARB in the ordinary course of business. The penalty in this case was also based on confidential settlement communications between ARB and CON-WAY FREIGHT that ARB does not retain in the ordinary course of business either.

The penalty also reflects ARB's assessment of the relative strength of its case against CON-WAY FREIGHT, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that CON-WAY FREIGHT may have secured from its actions.

**California Air Resources Board**

By : Ellen M. Peter

Name: Ellen M. Peter

Title : Chief Counsel

Date : 2/9/2012

**Con-Way Freight**

By : [Signature]

Name : RODERICK FLACASSI

Title : CHIEF COUNSEL & ASST SECRETARY

Date : 2.3.12